

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CONNIE McINTIER)	
Claimant)	
VS.)	
)	
SUPERIOR INDUSTRIES INTERNATIONAL)	Docket No. 166,173
Respondent)	
Self-Insured)	

ORDER

On April 11, 1995, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Fred Spigarelli of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What, if any, is the nature and extent of claimant's injury and/or disability.
- (2) The claimant's average weekly wage.

Issues raised before the Special Administrative Law Judge and decided by the Special Administrative Law Judge but not appealed to the Workers Compensation Appeals Board are herein affirmed in so far as they are not in contravention to the findings stated herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a 52-year-old woman with an 11th grade education, began working for respondent in its wheel factory in 1982. In 1989 she was transferred to the job of painter. She began experiencing a gradual onset of shoulder and neck pain in August 1991. The symptoms spread until they encompassed her entire upper extremities bilaterally. Claimant underwent examination, evaluation, and treatment by several doctors. She has at various times been diagnosed with Raynaud's phenomenon in both hands, left shoulder acromioclavicular dysfunction, right upper extremity pain, bilateral ulnar neuropathy, mild osteoarthritis of the hands, impingement syndrome of the right shoulder, periarticular arthritis of the right shoulder, right serratus anterior weakness, and cubital tunnel syndrome at the right elbow. The medical evidence is contradictory regarding whether these conditions were either caused or aggravated by claimant's work with respondent.

Claimant was examined and evaluated by several physicians. Michael J. Poppa, D.O., a physiatrist, examined claimant finding that only the cubital tunnel syndrome on the right side was related to her work. He assessed claimant a 5 percent functional impairment of the right arm and restricted claimant from lifting more than 20 pounds on a single lift, 10 pounds repetitively. Dr. Herbert B. Lindsley, the treating physician, felt claimant's right upper extremity pain and perhaps the bilateral ulnar neuropathy were related to her work. He did not feel claimant's Raynaud's phenomenon, which he considered to be one of her main concerns, to be work related. The longstanding osteoarthritis in her hands was also not related to her work. He placed several restrictions upon claimant including prohibiting work that would require her to use her arms over her head and lifting more than 30 to 40 pounds. Dr. Lindsley felt claimant should stop smoking as he felt her cigarette smoking had a direct relationship with the Raynaud's phenomenon.

Dr. Bernard M. Abrams diagnosed claimant with a multitude of conditions and felt that, with the exception of the serratus anterior weakness, all of claimant's problems were the result of the accumulated trauma stemming from her work with respondent. He opined that accumulative trauma could produce Raynaud's because the vibration or pressure would contribute to the condition. He also felt that working in the cold could be a factor. He opined that claimant's osteoarthritis, which he agreed preexisted her trauma, was aggravated by the trauma. He assessed claimant a 25 percent whole body functional impairment and restricted her to no repetitive motion of the wrists or arms, no lifting over 20 pounds, no overhead work, no twisting, crawling, kneeling, squatting, or climbing, required that claimant's sitting and standing be changed every 30 to 45 minutes, and she should avoid exposure to the cold. He recommended claimant change jobs.

In reviewing the medical evidence, the Appeals Board finds the medical reports of Dr. Lindsley to be more credible. Dr. Lindsley was claimant's treating physician and had the opportunity to examine and treat claimant over a period of several months. He was not a one-time examiner of the claimant but, instead, had the opportunity over a period of months to develop an opinion regarding claimant's ongoing symptomatology and the causes of her problems. However, Dr. Lindsley did not provide an opinion regarding what, if any, functional impairment claimant may have. The only functional impairment ratings the Appeals Board has to consider are those of Dr. Poppa who rated only claimant's right upper extremity at 5 percent and Dr. Abrams who rated claimant's entire body at 25 percent. K.S.A. 1992 Supp. 44-510e(a) defines functional impairment as:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

The medical evidence in this matter is contradictory regarding claimant's functional impairment. The one physician most in a position to estimate claimant's functional impairment, Dr. Lindsley, failed to do so. As such, the Appeals Board must, as the trier of facts, decide which testimony is more accurate and credible. The trier of facts is not bound by medical evidence but instead has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

In reviewing the medical evidence, the Appeals Board finds claimant has suffered a 15 percent permanent partial functional impairment as a result of the conditions, for which she is entitled to an award resulting from injury arising out of and in the course of her employment with respondent. In so concluding, the Appeals Board considers most persuasive the opinion of Dr. Lindsley regarding which of claimant's conditions are related to her work injuries.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

The Appeals Board must consider, based upon the more credible evidence of Dr. Lindsley, to what, if any, work disability claimant would be entitled.

Claimant last worked for respondent on July 18, 1992. She underwent substantial medical treatment at the hands of both authorized and unauthorized doctors. On June 13, 1994, a letter was sent to claimant via her attorney offering claimant a return to work with respondent at a specific job. This letter was received by claimant on

June 16, 1994. Claimant testified on June 20, 1994, regarding this letter offer and regarding the very detailed job description attached as an exhibit to the hearing transcript. Respondent stated on the record on more than one occasion that the job offer would be within the restrictions placed upon claimant by the physicians. A review of the detailed job description provided to the Court indicates that the job description was a light-duty job which met the restrictions placed upon claimant by the physicians whose evidence has been placed into the record. Claimant refused to accept the job, testifying that she felt this job would be too physically demanding for her as she had been involved in cleanup before, while working the paint job. Even though claimant was assured this was a different, accommodated job than the one she was discussing, claimant refused to attempt the return to work.

The burden of proof is on claimant to establish an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1992 Supp. 44-501, K.S.A. 1992 Supp. 44-508(g); see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Court of Appeals was asked in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied, 257 Kan. 1091 (1995) to consider a claimant's entitlement to an award when a specific job offer is made and the worker, having the ability to perform the job, nevertheless refused to perform that work or even attempt it. K.S.A. 1992 Supp. 44- 510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Court of Appeals in Foulk concluded that a literal reading of this statute would offer an unacceptable reward to claimants refusing to perform work for which they have the medical ability. Finding the result in that circumstance to be contrary to the intent of the Workers Compensation Act, the Court of Appeals concluded that the plain language should not be given its normal and natural meaning. The Court stated that the presumption should, therefore, apply to a worker who refused to attempt a proffered job at a comparable wage when that job is within the worker's ability.

The present case involves an offer by respondent to place claimant back to work at a job which is within the medical restrictions placed upon her by the doctors, at a comparable wage. The Appeals Board has in the past limited application of the Foulk decision to circumstances where claimant has refused employment which claimant has the ability to perform or where the claimant voluntarily removes him or her self from the labor market without good reason. In this instance, claimant was offered a job within her medical restrictions with the specific job duties detailed in the record. Claimant refused to attempt this job alleging she would be physically incapable of performing same, even though the restrictions placed on her by the doctors would not prohibit her from performing these duties. On the basis of the rationale of Foulk, the Appeals Board therefore finds that claimant has been offered a job within her restrictions and has voluntarily refused to

perform same. The Appeals Board finds therefore that as of June 20, 1994, claimant would be entitled to her functional impairment only. Prior to that date the Appeals Board finds claimant is entitled to a work disability pursuant to K.S.A. 1992 Supp. 44-510e.

In determining the extent of permanent partial disability, both claimant's reduction in ability to perform work in the open labor market and her ability to earn comparable wages must be considered. The statute is silent as to how this percentage is to be arrived at. In Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Supreme Court indicated that while a balance of the two factors is required, the statute does not specifically state as to how this balance is to occur or what emphasis is to be placed upon each of the prongs. The evidence in this matter comes from two experts, Karen Terrill and Gary Weimholt. Karen Terrill found that claimant had suffered a 35 to 45 percent loss of ability to earn comparable wages. Gary Weimholt, considering specifically the restrictions placed upon claimant by Dr. Lindsley, found that claimant had suffered a 48 percent loss of labor market access. He also opined that claimant had a potential to earn between \$200 to \$240 per week. This would result in a 35 to 46 percent loss of wage earning abilities. In considering the evidence from both Ms. Terrill and Mr. Weimholt, the Appeals Board finds claimant has suffered a 40 percent loss of ability to earn comparable wages. In considering the evidence provided by Mr. Weimholt and based upon the restrictions placed upon claimant by Dr. Lindsley, the treating physician, the Appeals Board finds claimant has suffered a 48 percent loss of labor market access. As the Appeals Board finds no compelling reason to place additional emphasis upon one test over the other, the Appeals Board finds that claimant has suffered a 44 percent permanent partial general body work disability as a result of the injuries suffered while working with respondent. Claimant would be entitled to this work disability through June 19, 1994. Thereafter claimant would be entitled to her functional impairment of 15 percent to the body as a whole.

With regard to the claimant's average weekly wage, the Appeals Board finds that the Award of the Special Administrative Law Judge sets forth findings of fact and conclusions of law regarding claimant's average weekly wage which are both accurate and complete and the Appeals Board adopts the same as its own in finding claimant has proven her entitlement to an award based upon an average weekly wage of \$325.31 through December 10, 1993, and thereafter an average weekly wage of \$367.18 per week.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated November 14, 1994, should be, and is hereby modified and claimant, Connie McIntier, is granted an award against Superior Industries International, a qualified self-insured, for an injury on July 18, 1992, based upon an average weekly wage of \$325.31 through December 10, 1993, thereafter based upon an average weekly wage of \$367.18, for a 44 percent permanent partial general body work disability through June 19, 1994, and thereafter for a 15 percent permanent partial general body functional disability for injuries suffered with respondent.

Claimant is entitled to 73 weeks temporary total disability compensation based upon an average weekly wage of \$325.31 at the rate of \$216.88 in the sum of \$15,832.24 followed by 5 weeks temporary total disability compensation at the rate of \$244.80 based upon an average weekly wage of \$367.18 in the sum of \$1,224 followed thereafter by 22.14 weeks permanent partial general body disability at the rate of \$107.71 per week totaling \$2,384.70 and followed thereafter by 314.86 weeks permanent partial general body functional disability at the rate of \$36.72 per week in the amount of \$11,561.66 for a total award of \$31,002.60.

As of October 2, 1996, claimant is entitled to 73 weeks temporary total disability compensation at the rate of \$216.88 in the sum of \$15,832.24 followed by 5 weeks temporary total disability compensation at the rate of \$240.80 in the sum of \$1,224 followed by 22.14 weeks permanent partial general body disability at the rate of \$107.71 per week in the sum of \$2,384.70 followed by 119.43 weeks permanent partial general body functional disability at the rate of \$36.72 per week for the sum of \$4,385.47 for a total due and owing of \$23,826.41 which is due and owing in one lump sum minus amounts previously paid. Thereafter claimant is entitled to 195.43 permanent partial general body functional disability at the rate of \$36.72 per week totaling \$7,176.19 until fully paid or until further order of the Director.

Future medical benefits may be awarded only upon proper application to and approval by the Director.

Unauthorized medical expenses of up to \$350 are ordered paid to on behalf of the claimant upon presentation of itemized statements verifying the same.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are assessed against the respondent to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	\$150.00

Martin D. Delmon	
Transcript of Regular Hearing	\$ 70.90

Patricia K. Smith	
Deposition of Connie McIntier (4-1-94)	\$146.35
Deposition of Karen Crist Terrill	\$ 71.80
Deposition of W. G. Triplett	\$ 92.70
Deposition of Michael Ashmore	\$124.65
Deposition of Connie McIntier (6-30-94)	\$135.05
Deposition of Gary Weimholt	\$202.50

Hostetler & Associates	
Deposition of Bernard M. Abrams, M.D.	\$164.50
Deposition of Michael J. Poppa, M.D.	\$339.75
Deposition of Herbert Lindsley, M.D.	\$283.90

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Fred Spigarelli, Pittsburg, KS
John I. O'Connor, Pittsburg, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director